
U.S. Department of Labor
Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005

CASE NO.: 88-ERA-31

In the Matter of

JOHN R. BRYANT
Complainant

v.

EBASCO SERVICES, INC.
Respondent

Appearances:

Robert W. Smith, Esq.
758 Vieux Marche' Mall
Biloxi, Mississippi 39533
For the Complainant

Karen C. Geraghty, Esq.
Ebasco Services, Inc.
Two World Trade Center
New York, New York 10048-0752
For the Respondent/Employer

Before: JAMES W. KERR, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER ON REMAND

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Procedural History

This case arises under the employee protection provision of the Energy Reorganization Act of 1974 (ERA) as amended, 42 U.S.C. § 5851 (1982).

Complainant worked for Respondent, Ebasco Services, Inc. ("Ebasco" or "ESI"), as a quality control inspector from July 25, 1985 until he was terminated January 9, 1987. Thereafter, he filed a timely ERA complaint on January 20, 1987, with the U.S. Department of Labor (DOL) against Respondent, alleging retaliatory discharge for a protected activity (refusal to approve an improper weld). On April 10, 1987, the parties, prior to completion of investigation of the complaint by the Nuclear Regulatory Commission, signed a "release" agreement, the terms of which must be determined by this Court.

Complainant filed a second complaint January 11, 1988, alleging that Respondent violated the terms of the April 10, 1987 agreement by refusing to rehire him and "blacklisting" him because of his prior complaint.

On March 15, 1989, this Court recommended an Order of Dismissal, granting Respondent's Motion for Summary Decision requesting dismissal of the case. On July 9, 1990, the Secretary of Labor issued a Decision and Order of Remand, granting the dismissal in part and remanding in part. The Secretary stated:

> To the extent that Complainant seeks reinstatement to his former position as a quality control inspector at a nuclear power plant, the ALJ correctly concluded that Complainant's admitted lack of a high school diploma or GED equivalency is dispositive...because he cannot show that he has the educational qualifications required for these jobs with Respondent.

Decision and order at pp. 5-6.

The Secretary further found, however, that

> The ALJ did not address Complainant's additional allegation that he applied for jobs with Respondent which do not require a high school diploma or GED equivalency and for which he was qualified. Complainant proffered

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> evidence to support his contention that he sought any "comparable position" with Respondent for which he was qualified and not simply reinstatement to his former position as a quality control inspector...The ALJ did not indicate whether this evidence was considered, and he failed to discuss the effect, if any, of the alleged reemployment terms of the prior settlement agreement. Neither was Complainant's allegation of blacklisting by Respondent addressed. Complainant alleged that "bad paper" rumors were being spread by Respondent's personnel...and Complainant has submitted evidence which, if accepted as true, would satisfy his burden of establishing a prima facie case of blacklisting against Respondent.

Decision and Order at pp. 6-7 (exhibit citations omitted).

The Secretary instructed this Court that

> Consequently, Complainant's allegations of blacklisting and retaliatory refusal to rehire or hire in a non-quality control position, must be decided [and] this case must be remanded to the ALJ for evidentiary hearing on these allegations. In remanding this case, I reach no conclusions, nor should any be inferred, as to the merits of these allegations.

Decision and order at p. 7.

An evidentiary hearing on the terms of the prior settlement agreement and its effect on Complainant's remedy, and on the issue of blacklisting, was held April 10 and 11, 1991, in Metairie, Louisiana.[1] Subsequently, the transcript for April 11 was misplaced, necessitating a second evidentiary hearing December 6, 1991, in Metairie, to recapture the second day of testimony. The parties were given the opportunity to submit post-hearing briefs, and both did so timely.[2] This recommended decision is based upon the entire record.

Statement of the Case

Ebasco is a subsidiary of ENSERCH Corporation and parent of several independently operated and/or partially owned companies.

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(Tr. II pp. 141, 148, 212, 209, 141, 150).[3] Bryant, the Complainant, was employed as a quality assurance inspector at the salary of $34,609.04 per year, a "bracket 9" employee. (RX 11 p. 2). This and all bracket 9 "comparable" positions require a high school diploma. (Tr. II. pp. 158, 167). Undisputed testimony by Arthur Chalmers Omberg, Jr., manager, compensation and policy for Ebasco, shows that without a high school diploma, Claimant would be eligible for a "bracket 4" position or lower, and there is no job with Ebasco that does not require a high school diploma within the vicinity of the South Texas Nuclear Plant (STNP). (Tr. pp. 154, 159-162; RX 29).

It is undisputed, and all parties agree, that at hire, Complainant submitted a falsified resume, Ebasco employment application form, and diploma, all stating that he was a high school graduate, when in fact he has only a seventh-grade education. (*See* RX 1). Complainant also swore to their truthfulness. At the hearing, Complainant admitted that he has been using the false information since about 1970. (Tr. p. 113). It is clear that Ebasco relied on his falsified high school diploma from "Antioach [sic] High School." A company "Background Verification Status" form, forwarded to STNP (author unknown), states: "Called STP re info about where his HS records are kept since his HS no longer exists....Site does have a copy of his diploma." (RX 1 p. 16). Through August, 1987, the

company attempted to verify his high school records, calling various school officials who eventually told them that many records from Antioch, Mississippi, schools had been lost. The company employee noted, "unable to verify." (RX 1 p. 31). It is also undisputed, and has been determined by the Secretary, that Complainant cannot be reinstated to his former position as quality assurance inspector in the nuclear industry, as a high school diploma is required.

Complainant was employed by CQP at STNP to inspect the heating ventilation and air conditioning (HVAC) system. (Tr. II p. 75). According to Mr. Richard Healy, vice-president of internal operations and special projects at Ebasco, and an Ebasco employee for 34 years, and Mr. Omberg, most of the thousands of workers employed at STNP, which is owned and operated by Houston Lighting and Power Company, were employed through ECI under a collective bargaining agreement which required all craftworkers (including welders) to be union members, and who were hired through a local union hiring hall. ESI was the quality assurance inspection subcontractor for STNP. (Tr. II. pp. 69-70, 73, 147-148, 204-206,

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209-212). Complainant calls this a "shell game" but offers no evidence, other than statements by counsel in the post-hearing brief, that the corporate structure is other than as stated by the company or that hiring occurs in any other manner. See Brief for Complainant at p. 10, footnote 6.

At an unspecified date during his employment, Complainant apparently was involved in the writing of a deficiency notice for a particular weld at STNP.[4] According to Mr. Healy, in late 1986 HL&P directed that ESI streamline operations as a result of completion of the HVAC inspection work, resulting in the layoff of 19 quality control inspectors, including Complainant, on January 9, 1987. All but one person in HVAC was laid off by mid-1987, and all ESI employees were laid off by December 1988. (Tr. II pp. 73-78, 131; RX 10). According to Mr. Healy and Mr. Omberg, ESI sought other employment for Complainant before his layoff, after his layoff, and before he signed the April 10, 1987 release, in the form of submission of his name for work on potential future contracts. (Tr. II pp. 87, 94, 96, 135, 144; RX 10; RX 16).

After he was laid off, Complainant filed the first complaint with the Department of Labor, and it was investigated by Compliance Officer Samuel Perez through April 10, 1987. He entered into negotiations with Mr. Christopher Luis, counsel for ESI. Undisputed testimony shows that Luis acted with the authorization of Healy, and that Luis dealt only with Perez, never with Bryant. (Tr. II pp. 84-87, 146). Ebasco invoked attorney-client privilege and Luis did not testify. Bryant's sole contact was Perez. (Tr. I p. 28).

Perez and Luis apparently negotiated a settlement, and Bryant signed a document captioned "Release" on April 10, 1987. The authenticity of that document, or of

"Attachment 2 (Calculations)" (RX 12) is not in dispute, nor is the amount of back pay or the fact of a monetary payment disputed. (Tr. II p. 46). The parties disagree, however, on whether that "Release" embodied the entire agreement of the parties or whether there was an oral promise to reinstate Complainant to a "comparable position" at ESI. It is the opinion of the Secretary that the terms of the agreement were "unclear on the present record" and that the settlement itself was oral.

Mr. Perez sent a copy of the signed "Release Statements" to

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Complainant, and referred to "the settlement." Ebasco did not admit to any wrongdoing. (RX 13). It was the opinion of Perez that "had the firm not offered to settle the complaint...the fact finding would clearly demonstrate Mr. Bryant suffered discrimination as a result of addressing quality concerns in his position as a quality control inspector." (RX 1 Exhibit C). On October 30, 1987, Mr. Perez sent a note to Mr. Luis, stating that one of the agreement terms was a position "comparable" with Complainant's former employment, and that until such a position was supplied, the settlement terms would not be met. (RX 1 p. 114). Mr. Healy stated that he had not authorized any such settlement term. (Tr. II pp. 99, 101). Claimant submitted evidence in the form of a handwritten list of the terms of settlement (written by Claimant) that he gave to Mr. Perez during the term of settlement negotiations; first on the list was "reinstatement of job." (RX 1, Exhibit K).

Ebasco asserts that "Hiring of particular individuals at any site location is within the sole purview of Ebasco's client. It is the client who decides who of the offered candidates will be hired. Since this is the reality of Ebasco's business, it would not have been possible to promise to reinstate Mr. Bryant to any position, even assuming he had not lied about having a high school diploma." (PX 10 p. 2).

On January 19, 1988, Complainant filed the second complaint, through a letter to Mr. Perez's supervisor, which was again investigated by Mr. Perez. (RX 18). According to Mr. Perez, complainant intimated that he had been "black-balled" but could submit no evidence of such. He did uncover use of the term "bad paper" used in reference to Complainant, but the term was not defined. (RX 3). On March 11, 1988, Mr. Perez and Mr. Luis spoke, and Mr. Perez informed Mr. Luis that Complainant probably did not have a high school degree, despite representations to Perez and his employer that he did. Mr. Perez could not find evidence to substantiate Complainant's allegations of blacklisting. Mr. Perez noted that even at that point, Complainant insisted that he did have a high school degree. (RX 20).

At the hearing, Complainant admitted that he lied about his degree to ESI and all previous employers since 1970, and to Mr. Perez and Administrative Law Judge James Kerr. (Tr. I pp. 33-34, 40, 114). Complainant also testified that he sent his falsified resume, which he had used for 20 years, to a nuclear facility

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called Comanche Peak, which is owned and operated by HP&L, for a quality control position (inspector). (Tr. I pp. 113, 26, 133; Tr. II pp. 145, 133, 51). In fact, in filing his second complaint with the Department of Labor, he apparently attached the falsified resume as proof of his qualifications. (PX 3 pp. 14-16).

Mr. Healy testified that shortly after Complainant's falsified degree was discovered, all of his work was re-inspected at a cost of more than $50,000. (Tr. II pp. 120-122).

As its evidence of "blacklisting," Complainant submitted his own testimony that he submitted "over 200 resumes" to various nuclear industry and non-nuclear employers. (Tr. II pp. 133-134). He testified he received not one response or reply. (Tr. II p. 18). However, he could not specify what jobs he applied for, wages, or educational requirements for any company. The list also contains names of competitors of Ebasco, job shoppers, and nuclear power facilities (for which Complainant is not qualified). (Tr. II p. 19). Respondent correctly points out that Complainant submits as documentary evidence a list of employers (without job descriptions), some of which are listed more than once, many without dates, and some with dates listed from January, 1987 through April, 1988. (PX 12). In fact, next to "Foster Wheeler" is the notation "sent resume 1/3/87," which would have been *prior* to Complainant's layoff of January 9, 1987. (PX 12 P. 1). There are fewer than 200 notations.

Complainant submitted no proof of search for employment for most of 1988, 1989, and 1990, and admitted that he did not seek work in 1991. He did not at any time seek minimum-wage employment that might be available to someone without a high school diploma, "because there's no way you can support a wife and two kids on minimum wages." (Tr. II pp. 40-42). Complainant stated that he told Ebasco's personnel director, Mr. Hoops, that he was willing to go back to work in "anything you got," even a temporary job at Comanche Peak, and that thereafter, Mr. Hoops refused to speak to him or return his calls. (Tr. pp. 133-134). In his second complaint to Department of Labor, Complainant notes that he was told that the Comanche Peak client had been told he had "bad paper work" while at South Texas, but when he called Bob Urell, personnel manager for Ebasco at the STNP, Mr. Urell replied "that I had a good record, and I was for rehire." (PX 3 p. 14). On cross-examination, however, Complainant agrees that he could not work at

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Comanche Peak because he does not have a high school diploma. (Tr. II p. 51, 671). At the hearing, Complainant testified that he had not as yet completed work toward obtaining his GED, and that it was "hard for him to even think straight." (Tr. II pp. 23-26).

Mr. Ronald Abel, an Ebasco employee, stated at deposition that he had heard from other Ebasco employees that they had heard a rumor about Complainant's "bad paper," but could not state the source of the rumor; further, Mr. Abel regards "bad paper," which he defines as incorrectly filling out paperwork, "an inconvenience" and not a major problem, but that he did not believe Complainant had authored "bad paper" in any event. (PX 1 pp. 79-83). Three of Complainant's exhibits, PX 5, 6, and 7, are statements given orally to Mr. Perez of the Department of Labor *after* investigation had revealed that Complainant did not have a high school diploma. The authors of those statements are unknown; Complainant testified that he could identify the makers of the statements. (Tr. I p. 137). Complainant also testified that he does not know of any particular individual alleging that he had "bad paper." (Tr. II p. 27). PX 5 is a discussion specifically about Complainant's *resume*, and it appears that Complainant himself initiated the discussion. P6 is also a discussion of the re-inspection work and discovery of "a problem with Johnny Bryant's qualification," and that "all the work he has ever done is suspect until we can verify he graduated from high school." The author of PX 6 stated "We were in the process of inspecting some of his work at South Texas and I told [Doug Snow, Texas Utilities QC supervisor] Johnny was not to be considered for employment at this time due to the re-inspections." The author of PX 7 stated:

> Yes I know about the resume of Johnny Bryant. The resume was sent down from Mr. Brandt's office to us. review all the resumes/applications for EBASCO. I was informed by that Johnny Bryant had had "bad paper" at South Texas. Basically the term signifies that a particular inspector had some problems/errors with some of his inspections. It could be a number of things such as papers filed incorrectly; using incorrect procedures; test undocumented; or any paper filed incorrectly.

Employer denied that its employees Tom Brandt and Dick Sprouse advised the Department of Labor that they had heard Claimant had "bad paper." (PX 9 P. 2).

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Complainant asserts that pursuant to agreement between the parties April 10, 19871 Complainant must be reinstated to a position "comparable with his qualifications and experience," with back [or front] pay, costs and attorney's fee. Complainant does not request an additional remedy for the alleged blacklisting.

Respondent asserts that it is not required to rehire Complainant under the terms of the written release. Alternatively, it argues that Complainant's misrepresentation of his qualifications bars his claim, or that it has an independent cause (misrepresentation) justifying termination and/or refusal to rehire. Respondent also asserts that Complainant is not qualified for any non-quality program positions within ESI. Finally, Respondent denies blacklisting or retaliation against Complainant.

It is at this point that the case comes before this Court for resolution.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The first issue to be addressed is the terms of the settlement agreement. As the written terms are not in dispute, the inquiry will stress the oral terms, if any, and their effect.

Clearly, it is the opinion of Mr. Perez, the Department of Labor investigator and negotiator of the settlement, that Claimant had bargained for re-instatement. As the drafter of the document, Respondent must prove its terms. Respondent put forth as its evidence the testimony of Mr. Healy, who was not a party to the actual negotiation, that it was not his intent to promise reinstatement as a settlement term. Other evidence shows that it is the belief of Respondent that it could not make such concessions. The negotiator of the settlement, however, has invoked attorney-client privilege and will not testify. Therefore, there is no proof that what Mr. Healy intended to be promised was what Mr. Luis and Mr. Perez bargained for.

Mr. Bryant also stated unequivocally that reinstatement was the foremost condition of settlement. It seems highly unlikely that Mr. Perez and Respondent would leave out such a key term. The signed document in question is merely a release of liability, but does not represent the sole and complete bargain of the parties. In essence, the document should be read as stating that once the terms of the settlement have been met, ESI is no longer liable to Complainant for damages arising out of the layoff of January, 1987.

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In this case, parol evidence is, admissible to prove the terms of the settlement, as the parol evidence does not conflict with, add, or vary any specific term of a contract, but merely serves to explain the ambiguous settlement terms. The same result could be reached in this case by holding that the "release" applied to both the oral promise for re-employment and the written "calculations" (Attachment 2 to the "Release") of the amount of back pay and "settlement sum" due to Complainant.

It seems unlikely that Complainant, who had at the time of settlement at least a colorable claim of retaliatory firing (later proven to be a highly likely successful claim) would bargain away all of his rights, including future employment, for six weeks' back pay and a small ($2,0001 "settlement sum." This is particularly true since at that time Employer did not know that Complainant was not qualified for the quality assurance inspector's position. Employer, on the other hand, admits that it felt pressured to settle to limit the adverse publicity Complainant's charges might have caused. (Tr. II pp. 132-134). In addition, Employer, bargaining with benefit of counsel and as the drafter of the document (Mr. Perez apparently is not an attorney) bore the burden at the time of making of the contract of making certain that the settlement agreement was completely integrated and explicitly contained all of the terms of the parties. In this case, the Employer was in the superior bargaining position, and this is not a case of co-equals bargaining over a business contract. Both Mr. Perez and Complainant were left with the distinct impression that Complainant was promised reinstatement. Therefore, the Court holds that the

settlement included not only the back wages, but a term for reinstatement to a "comparable position" as well. The Court also believes, based upon the evidence of record presented by both parties, that Complainant was to be put in the same position as if the defective weld incident had not occurred. Thus, the Court does not believe Complainant was promised "a job, any lob" immediately, especially during layoffs when none were available, but was promised the option of employment as layoffs ended and vacancies arose, just as any other employee would be considered.

The next issue to be addressed is the effect of that oral promise for reinstatement under the facts of this case. Respondent presented uncontroverted evidence that it laid off all but one of its CQP inspectors at STNP near the time Complainant was laid off, and that by mid-1987, Complainant certainly would have been laid off. Mr. Healy stated that on January 6, 1987 (after Complainant

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had reported the defective weld but just prior to his layoff) Claimant was being considered for employment at Comanche Peak and was put on another list on March 13, 1987 (one month before settling with Respondent but after filing the first claim) for another project. Mr. Healy stated that the nature of quality assurance inspection work is sporadic, but that Complainant's name was consistently put on re-employment lists for future projects. (Tr. II pp. 91-95). ESI was certainly under no obligation to rehire Complainant to a position that no longer existed. ESI had no obligation outside the agreement to act as an employment agency and find a job for Complainant elsewhere (no one has claimed that this was a settlement term, or that Complainant was offered preferential treatment over and above that of other employees).

Respondent has presented evidence, which this Court accepts as true, that ESI alone contracted with Complainant and ESI alone was responsible for providing him a position. If ESI had no comparable positions, it could not provide a position to complainant. In addition, Complainant may not look to separate corporate entities as parties to this contract without presenting arguments and evidence in support of his theory that one is the alter ego of another. Complainant presented no such proof. Mr. Healy also noted that the nuclear industry was in a marked downturn in 1987-1988, with significant layoffs. The Court accepts as true the fact that Ebasco Construction's craft workers are not Ebasco employees, but are hired through the local hiring hall. Complainant has failed to prove that he would have been qualified for any of those positions, or that there was *any* ESI position for which someone less qualified than he was employed by ESI between April 10, 1987 and March, 1988.

To further complicate matters, it is undisputed that Complainant repeatedly lied about his qualifications for the position. Although Complainant attempts to characterize this as a 20-year-old, inconsequential error, he maintained this lie, and affirmatively represented that he had a high school degree, until March, 1988. In fact, Complainant did not even complete the majority of work for a high-school diploma; he has only a seventh-grade

formal education. The time for this disclosure should have been at the time of bargaining for his re-employment. By not doing so, Complainant did not bargain in good faith. Complainant committed fraud (1) in his original application with the company, where he submitted falsified documents upon which the company relied in hiring him, (2) when negotiating for settlement, by

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failing to disclose to ESI the material fact that the only type of comparable positions for which he was qualified were those not requiring a high-school diploma, and (3) by lying to Mr. Perez and his supervisor, Mr. Brown, at the U.S. Department of Labor, about the fact of his high-school diploma, both at the time of settlement negotiations and in representations of his qualifications while filing the *second* claim.[5]

In essence, Complainant's entire tenure with ESI was procured by fraud, and his continued employment was procured by fraud. Thus, the Court will strike the fraudulently procured portions of the settlement agreement (neither party has urged that the entire settlement be made a nullity), that is, the continued employment provisions. Had Complainant been truthful with Employer about his qualifications at settlement, the negotiations would have taken on an entirely different character.

The Court also agrees that ESI would have had an independent basis for discharging Complainant at any time, even if he had not engaged in protected activity. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1988) (plurality opinion); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 1977), *Dunham v. Brock*, 794 F.2d 1037 (5th Cir. 1986); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984). Therefore, the failure to rehire after March, 1988, when the Employer discovered the education discrepancy, is not retaliatory refusal to rehire.

A claim for retaliatory harassment is recognized under the employee protection section of the ERA. *See English v. Whitfield*, 858 F.2d 957 (1988). Complainant has asserted no other legal authority under which this Court could recognize his claim for "blacklisting." The Secretary held that in the present case, Complainant's allegations, if taken as true, support a prima facie case of blacklisting.[6] The Court holds that Complainant has made a weak but sufficient showing to support an inference of blacklisting. Respondent, however, has submitted compelling and overwhelming rebuttal evidence. Indeed, Complainant's own exhibits lend credence to Respondent's defense.

In each case where Complainant alleged an Ebasco employee knew or heard about "bad paper" (PX 5, 6, and 7), the statement was actually prefaced with the word "resume" in some fashion.

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Complainant himself admitted that he knew of no Ebasco employee who was spreading the rumor that Complainant had "bad paper." It is also apparent that Complainant was asking Ebasco employees if they had heard any rumors about him; it is as probable that this is the source of the rumors as it is that an Ebasco employee was the original source. Claimant is also the only person who reads extremely dire consequences into use of the words "bad paper" or "bad paperwork." No nuclear industry employee except Complainant testified that that phrase associated with one's name made one unemployable. Mr. Abel testified that it was more of an inconvenience for the company.

This Court finds that the "Paperwork" in issue was just as likely his falsified employment documents as anything relating to incorrectly filed inspection documents. In addition, the one incident where an Ebasco employee spoke to another potential employer about Complainant, he was not recommended due to inspection of his work *because his qualifications were in question*. Indeed, Complainant is not qualified. Thus, Ebasco's statements were entitled to conditional privilege. In sum, Complainant has failed to substantiate his blacklisting allegation.

As Complainant has failed to prove retaliatory firing or blacklisting, the complaint in this case must be DISMISSED with each party to pay its own costs, expenses, and attorney's fee.

Entered this 27th day of February, 1992, at Metairie, Louisiana.

JAMES W. KERR, JR.
Administrative Law Judge

JWK/tb

[ENDNOTES]

[1] The Court substantially adopts Respondent's citation style for purposes of uniformity. Citations to the transcript of the hearing April 10, 1991 will be denoted "Tr. Ill and for December 6, 1991, "Tr. II;" Claimant's exhibits will be denoted "PX;" Respondent's exhibits will be denoted "RX."

[2] After the close of the record, both parties submitted letters to this Court including apparently recently discovered case law they considered applicable. The Court may take judicial notice of this case law, but will not at this late date accept the parties' characterization or analysis of these cases.

[3] Respondent presented unrefuted evidence that the independently operated companies, including Ebasco Constructors Inc. (ECI), maintain separate corporate identities.

[4] Complainant stated in his brief that in an investigation conducted by Houston Power and Light, Bryant's supervisor at Ebasco admitted that he gave Complainant a low ranking for "technical expertise" due to his involvement with the deficiency notice. The

exhibit cited by Complainant for this proposition, RX 12 p. 16, is not in evidence (RX 12 does not contain 16 pages; pages 6-22 have been rejected) and could not be located in the record by this Court, and thus may not be credited.

[5] Pursuant to 18 U.S.C. § 1001, Complainant could also have been subjected to a fine or imprisonment for falsifying and covering up material fact during an investigation by the U.S. Department of Labor. Also, a recent case in the Sixth Circuit, *Johnson v. Honeywell Information Systems, Inc.*, ____ F.2d.____ (1992), decided under Michigan law, holds that an employer may rely on an employee's false representations (falsified educational requirements) as a defense to wrongful discharge even if the employer is unaware of the grounds for discharge at the time of discharge.

[6] Respondent has briefed Texas law (Tex. Code Ann. Art. 5196c-5196f) for its arguments against "blacklisting." In light of the fact that blacklisting is not defined in the ERA, the Court will look to the Texas statute's definition of blacklisting, but use federal case law to determine the elements of a prima facie case under the ERA. Those elements are outlined in *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989) as follows:

> (1) engagement in a protected activity; (2) defendant's awareness of plaintiff's engagement in protected activity; (3) plaintiff's subsequent [blacklisting]; and (4) that the [blacklisting] followed the protected activity so closely in time as to justify an inference of retaliatory motive.

("Blacklisting" is substituted for "discharge".) Respondent has pointed out that Texas law defines a blacklisting employer as one who

> [places] or causes to be placed, the name of any ... employee ... on any book or list, or publishes it in any newspaper, periodical, letter or circular, with the intent to prevent said employees from securing employment of any kind with any other person, firm, company or corporation, either in a public or private capacity.

Art. 5196(c). An employer who supplies a written, truthful statement for the reason an employee is discharged is entitled to a qualified (conditional) privilege, if the statement cannot be the basis for a libel claim by the former employee.